IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 45 of 1999
with
SPSECIAL CIVIL APPLICATION No. 1320 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 Yes
2 to 5 No

RAJESH BABUBHAI DAMANIA

Versus

THE COMMISSIONER OF INCOME TAX

Appearance:
MR NR DIVETIA with MR SN DIVETIA for Petitioner
MR BB NAIK for MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.R.DAVE

Date of decision: 28/06/2000

ORAL JUDGEMENT

(per R.K. Abichandani, J.)

The Income Tax Appellate Tribunal, Ahmedabad, Bench 'C' has referred the following questions of law for the opinion of this Court under section 256(1) of the Income-tax Act, 1961.

"Whether, on the facts and circumstances of the case, the Tribunal was right in law in restoring the matter to the A.O. instead of dismissing it?"

"Whether, on the facts and circumstances of the case, decision of the Tribunal to restore the matter to the A.O. is such as could have been arrived at?"

"Whether, on the facts and circumstances of the case, decision of the Tribunal to allow the appeal and to restore the matter back to the A.O. is such as could have been arrived at from the material on the record or is reasonable which could be arrived at instead of dismissing it?"

2. The relevant Assessment Year is 1985-86. The assessee was carrying on business on a small-scale in stainless steel utensils. He had filed return of income for the said Assessment Year declaring a total income of Rs. 15,423/-. The assessee had received deposits from six parties on 14th and 25th April 1984 and had repaid all of them in the years 1984 and 1985. The Assessing Officer, disregarding the evidence produced by the assessee in respect of the identity and genuineness of the parties and their financial capacity, made an addition of the amount of said six deposits totalling Rs. 2,80,000/-. An appeal was preferred by the assessee before the CIT (Appeals) who accepted the assessee's contentions regarding the genuineness of these transactions and deleted the addition of the said amount of six deposits.

3. In the appeal preferred by the revenue, the Tribunal held that in case of cash credit entries, the assessee has to prove the identity of the cash creditor, capacity of the creditor to advance the loan and genuineness of the transaction. The Tribunal held that the Assessing Officer, for the reasons best known to him, did not care to examine the 5 creditors and did not take note of the voluminous evidence which was adduced by the assessee. It was found that the Assessing Officer had adopted a short-cut method and placed reliance on the

statements of 3 creditors which were recorded during the search. The Assessing Officer did not supply the copies of those statements to the assessee against whom they were used by him and, thus, violated the principles of natural justice. The Tribunal observed that the Assessing Officer was "a bit negligent" in not examining the creditors who were produced by the assessee before him and that the ends of justice would be met if "fresh innings" be given to the Assessing Officer. The Tribunal held that the only course that was left was to restore to the Assessing Officer the matter so that he may cross-examine the creditors in light of the statements, affidavits and other evidence on record and also give an opportunity to the assessee for the purpose.

4. On going through the decision of the Tribunal, it appears to us that the Tribunal has totally ignored the fact that the order of the Assessing Officer had merged in the appellate order of the CIT (Appeals) before whom the assessee had succeeded. The CIT (Appeals), in his order dated 24th October 1988, while deleting the addition of Rs. 2,80,000/-, held that the assessee had done all that he could do to prove that the cash credits were genuine and that the ITO was not correct in rejecting the evidence led by the assessee during the course of the proceedings merely on the ground that the loan was not substantiated by means of any other corroborative evidence. The appellate authority noted that the ITO was supplied with the copies of affidavits, etc. well in time. The parties were produced before him for examination. The CIT (Appeals) appreciated the evidence as follows:-

> "I have gone through the contents of the elaborate nature of the affidavits and on perusal thereof, I noticed that the loans were not only confirmed but also proved with reference to sources also. The appellant had furnished income-tax number and wards and evidence of repayment by account payee cheques. Before me, affidavit of the intermediary Shri Navinbhai Jariwala who introduced the party was also produced. Affidavit has to be considered as a good piece of evidence til and unless it is proved to be otherwise. I fail to understand as to why the Income-tax Officer did not examine the five parties when they were produced for his cross-examination on the request made by him i.e. the Income-tax Officer himself. In such set of circumstances I am constrained to give credence to the affidavits which have been filed by the

six parties during the course of hearing. I find from the detailed submissions made by the appellant before me that the appellant did everything in his power to prove the genuineness of the loans. He filed confirmatory letters, supplied to the Income-tax Officer. Income-tax No. and ward in which they are assessed, produced the parties for his verification and cross-examination he showed that all the loans were procured through intermediaries and were paid back by account payee cheques and the parties have given further loans to others which are also accepted by the department. Thus, everything possible has been done by the appellant to prove the loans and in effect I notice that the loans have definitely been proved as genuine. On the other hand, the Income-tax Officer has not brought any material on record to dislodge the evidence led by the appellant.

As regards the so-called statements relied upon by the Income-tax Officer (taken by the A.D.I.), obtained from the parties giving the loan, the Income-tax Officer preferred not to cross-examine any of the parties which were produced before him not once but on a number of times. The veracity of the statements thus stands vindicated and at this stage reliance to the contents of the details of the affidavits have to be made with reference to the evidence available under the Evidence Act. I have also noted that the assessment proceedings were spread over a full period of 17 months and that there was no reason for him not to examine the parties when produced on several occasions. As has been decided in the case of Addl. CIT, Bihar vs. Hanuman Prasad Agarwal, 151 IT 150 (Patna), if the appellant produced the confirmation of the parties, it is the duty of the ITO to verify the contentions, otherwise the evidences have to be accepted as correct.

The appellant proved the identity of all the six parties, he has proved the existence of all the parties, the capacity of all the parties were also proved by physical production of the parties, their affidavits and discussion and description in the written submissions. Moreover, all the parties have given loans in the past and that after the appellant repaid the loans they have given loans to other parties, and

> these loans were accepted by the Income-tax Department. Further, the loans were returned with interest by account payee cheques to all the six parties. The appellant filed confirmations, affidavits, counter copies; has given name, addresses, income-tax numbers etc. In my opinion, the appellant has proved the loans beyond a shadow of doubt and has discharged his burden to the fullest ability. I have considered each of the parties' capability to give loans as per the details of their sources of income narrated in the written submission. I also find that they are capable of giving such loans. Evidence have been found even in search operation. Nothing contrary have been alleged or proved. The Income-tax Officer has taken the easy course of avoiding proper scrutiny and verification of the claim, but more or less acted on surmises not supported by evidence. The Income-tax Officer has not brought on record any material to show that the same money has come back to the appellant in any way in any form. If, as alleged, the loans were bogus, then, certainly, he would have been able to do so on investigation. He did not and could not do it since the loans obtained and paid back were genuine. The I.T.O. has not proved that the loans repaid through account payee cheques have in any way come back to the appellant. The discrepancies in the statements of the father and the son have been reconciled and other similar observations made by the learned representative of the appellant. As such, I have no hesitation in holding that the action of the I.T.O. in making the huge addition of Rs. 2,80,000/- was not justified and unsupported by any evidence."

The CIT (Appeals), accordingly, held that the assessee did prove the genuineness of the loans by leading cogent and proper evidence and was entitled to deduction from his total income of the sum of Rs. 2,80,000 which was wrongly added by the ITO.

5. The Tribunal totally overlooked the assessment of evidence done by the CIT (Appeals) and dealt with the matter as if it was entertaining an appeal against the order of the Assessing Officer. There was no question of giving "one more innings" to the Assessing Officer. Appeals are not to be decided for giving "one more innings" to the lower authorities. In the appellate jurisdiction, the Appellate Court has to consider whether

there is justification for upsetting the order against which the appeal is filed. In this case where the assessee had repeatedly produced the creditors before the ITO and had filed affidavits in support of the credit entries and also filed confirmations and given names and addresses of the concerned parties as well as proved repayment of the amounts by account payee cheques and done all that was within his power to prove the genuineness of the loans, the finding arrived at by the Appellate Authority on the basis of such reliable material could not have been so cursorily dealt with by the Tribunal for the purpose of giving "one more innings" to the Assessing Officer. It was the duty of the Tribunal to ascertain the reasons which were given by the CIT (Appeals) in whose order the order of the Assessing Officer had merged and not to base its decision merely on "a bit of negligence" of the Assessing Officer in not cross-examining the parties who were produced before him 4 to 5 times. In our opinion, the Tribunal has reached the conclusion, which cannot reasonably be reached by anyone, and there is no warrant for restoring the matter to the Assessing Officer on such specious grounds as are given by the Tribunal.

6. We, therefore, hold that the Tribunal committed an error of law in restoring the matter to the Assessing Officer in background of the facts on which no such conclusion could have been reached by any reasonable approach. The questions referred to us are accordingly answered in favour of the assessee and against the revenue. The Reference stands disposed off accordingly.

7. In view of our answer to the questions referred to us in the above Reference, the learned counsel for the petitioner says that the above writ petition (Special Civil Application No. 1320 of 2000) will not survive and is not pressed. The petition stands disposed of accordingly. Notice is discharged with no order as to costs. Interim relief stands vacated.

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